BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES H. PIERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,005,762
SEARS ROEBUCK & COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the July 13, 2005 Award of Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on November 1, 2005.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). In addition, the parties have stipulated that claimant's average weekly wage on the date of accident was $1,107.38. Further, the parties stipulated that claimant began receiving Social Security retirement benefits on November 5, 2002, with the initial payments through the end of 2002 totaling $1,056 per month, which would compute to a retirement benefit offset under K.S.A. 44-501(h) of $243.69 per week. For the year 2003, claimant was paid $1,083 per month, which computes to an offset of $249.92 per week. For the year 2004, claimant's Social Security retirement benefits increased to $1,087.58 per month, which computes to a weekly offset of $250.98. For the year 2005, claimant's Social Security retirement benefits increased to $1,112 per month, which computes to a weekly offset of $256.62. The parties agreed that on the same date as claimant's Social Security retirement began, November 5, 2002,

claimant also started a new job with Security Self Storage, where claimant was being paid $950 per month, plus claimant and his wife were being provided additional compensation in the form of a two-bedroom apartment, with utilities provided. However, no specific value was placed on the house or the utilities.

The parties further agreed that a functional impairment of 25.5 percent to the body as a whole is appropriate for the purposes of the computation of this award. This represents an average of the 36 percent whole body functional impairment of Pedro A. Murati, M.D., and the 15 percent whole body functional impairment of Philip R. Mills, M.D. At oral argument, the parties acknowledged that the period of April 7, 2002, through November 4, 2002, represents 30.41 weeks. Claimant was paid 7.71 weeks temporary total disability compensation, leaving 22.7 weeks remaining between claimant's date of accident and the date claimant's Social Security retirement benefit and claimant's new job began.

ISSUES

1. What is the nature and extent of claimant's injury and disability?

2. How is this award to be computed?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant was employed with respondent as a salesperson. Claimant's job included selling windows and siding for home improvements and residential sales. Claimant's job required that he go to the residence or business, do a physical examination of the location, listing any damage, and making recommendations, and providing estimates for the repair or new construction.

On April 6, 2002, while performing an examination of a structure in order to provide an estimate for the replacement of windows, claimant fell from an attic to the bottom of a stairway, landing on his back and right shoulder. Claimant suffered thoracic, mid back and lumbar pain, as well as right shoulder pain. Claimant was instructed by his employer to go to the emergency room at Wesley Medical Center. Claimant returned to work on the following Monday and worked for approximately two weeks, during which time claimant was experiencing a lot of pain. Claimant had difficulty driving to the job site and ultimately concluded he was unable to perform the job because of the pain.

On April 25, 2002, claimant saw Dr. Patton, a partner in his family physician's office. At that time, claimant was taken off work. Claimant ultimately was referred to Dr. Jahnke,

who provided nerve conduction studies, epidural steroid injections, medication and physical therapy. He was then referred to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. Dr. Murati saw claimant on two occasions at the request of claimant's attorney. Claimant was then referred to Paul S. Stein, M.D., also at the request of claimant's attorney, with Dr. Stein becoming claimant's treating physician. Claimant was also referred to Philip R. Mills, M.D., board certified in physical medicine and rehabilitation, with Dr. Mills' examinations being performed at the request of respondent's insurance company. Claimant was also ultimately referred to neuropsychologist Mitchel Woltersdorf, Ph.D., at the request of respondent's attorney.

Claimant's last day worked for respondent was April 25, 2002. Claimant was paid 7.71 weeks temporary total disability compensation and received salary continuation payments from respondent for 20 weeks after he began missing work in April of 2002.

After it was determined that claimant was no longer capable of performing the work with respondent, claimant began looking for other employment. On November 5, 2002, claimant began working with Security Self Storage. This was a security job performed by claimant and his wife. Security Self Storage paid $950 a month each to claimant and his wife, and also provided them with an apartment to live in at the storage facility site.

At the time of regular hearing, claimant and his wife continued living at the Security Self Storage facility, performing the job duties, which included answering the telephone, providing customer service, showing the storage units, collecting money and maintaining the property in terms of both cleanliness and security. Claimant testified that his wife does the vast majority of the work at the business. However, claimant did acknowledge that at times, he participates in the job activities for Security Self Storage.

Claimant was referred to Jon Parks, M.D., by Dr. Stein, with Dr. Parks providing claimant pain management. At the time of the regular hearing, Dr. Parks continued to provide claimant with pain medications, although Dr. Parks had indicated a desire to terminate his treatment of claimant.

Dr. Stein first examined claimant on February 25, 2003. He ultimately diagnosed fibromyalgia, which he also called chronic pain syndrome. Dr. Stein then referred claimant to Dr. Ted Moeller for a psychological evaluation, which evaluation ultimately indicated that there may be an element of depression in claimant's ongoing condition. Dr. Stein also ordered claimant to undergo an MRI of the right shoulder, which indicated a rotator cuff tear. Claimant underwent EMG nerve conduction tests, which identified mild right carpal tunnel syndrome and some chronic nerve root irritation at the cervicothoracic junction. After a conversation with Dr. Moeller (during which Dr. Moeller recommended claimant be seen by a pain specialist), Dr. Stein referred claimant to Dr. Parks. Dr. Stein last saw claimant on June 17, 2004, at which time they had conversations about claimant's shoulder surgeries which had been scheduled and then cancelled. At that time, Dr. Stein advised

claimant he had no other treatment to offer and determined that claimant was not capable of functioning in the workplace.

Claimant was referred by his attorney to Pedro A. Murati, M.D., for two examinations. The first examination was on September 30, 2002, at which time claimant complained of neck pain, low back pain radiating into the right leg and upper back pain. Dr. Murati diagnosed low back pain secondary to bilateral radiculopathy, cervical radiculopathy and thoracic strain. He felt that claimant had myofascial pain syndrome bilaterally in the shoulder girdles, right shoulder pain secondary to a full thickness supraspinatus tendon tear, low back pain with bilateral radiculopathy, neck pain secondary to cervical radiculopathy and thoracic strain.

Dr. Murati was provided a task list prepared by vocational expert Jerry Hardin. Of the twenty-nine non-duplicative tasks on the list, Dr. Murati felt that claimant was unable to perform nine, for a 31 percent task loss. After the second examination on July 15, 2004, Dr. Murati opined that based upon a reasonable degree of medical certainty, claimant was able to work 8 hours a day. On redirect examination by claimant's attorney, Dr. Murati was advised that claimant was not working 8 hours a day and was on other types of medication. At that time, Dr. Murati modified his opinion to say that claimant is essentially and realistically unemployable.

Claimant was referred to Dr. Mills for two examinations, both at the request of respondent and its insurance carrier. Dr. Mills first examined claimant on October 7, 2002, at which time he diagnosed pain secondary to thoracic contusion and sprain. He opined that claimant was at maximum medical improvement and had a 15 percent impairment to the body as a whole based on the Cervicothoracic Category III of the fourth edition of the AMA *Guides*.[1] He performed a second evaluation on January 11, 2005, at which time, he diagnosed chronic pain syndrome with thoracic contusion/strain, myofascial pain syndrome, AC arthritis bilaterally with the right greater than the left and a probable degenerative shoulder rotator cuff tear. He also diagnosed tongue cancer and skin cancer of the right ear, which were not related to this accident.

Dr. Mills reviewed a task list prepared by vocational expert Steve L. Benjamin, advising claimant could no longer perform twenty-five of the seventy-three tasks on the list, for a 34 percent task loss. Dr. Mills acknowledged that claimant was quite impaired, but also acknowledged that claimant was working at Security Self Storage, which allowed claimant to limit his activities so that he could continue working.

Claimant was interviewed by neuropsychologist Mitchel Woltersdorf, Ph.D., at the request of respondent's attorney. Dr. Woltersdorf indicated claimant had pain and depression. After submitting claimant to several psychological tests, Dr. Woltersdorf

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

determined that claimant was clearly malingering, having discovered an FBS score (faking bad scale) of 27, which was above the marginal score of 20. Dr. Woltersdorf determined that a malingerer is someone who creates symptoms out of nothing or exaggerates genuine symptoms. He felt, with claimant, there was the possibility of malingering or issues of secondary gain

Claimant contends that he is permanently and totally disabled, being incapable of performing any substantial employment in the workplace. Claimant acknowledges he is being paid by Security Self Storage, but argues that the vast majority of the work is actually performed by claimant's wife, with claimant contributing little to the employment relationship. Respondent argues that while claimant's employment options may be limited, claimant is nevertheless employed, earning a monthly salary and being provided with a place to live. While claimant's wife may do the majority of the work, claimant is contributing and earning income. Claimant is, therefore, not permanently totally disabled, but respondent acknowledges claimant is entitled to a permanent partial general work disability under K.S.A. 44-510e.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case, but has the responsibility of making its own determination.[3]

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[4]

Claimant argues that he is permanently totally disabled as a result of the injuries of April 6, 2002. However, claimant continues in employment, even though the Board acknowledges claimant's employment may be the only job claimant is physically capable of performing. But nevertheless claimant has performed that job successfully since November 5, 2002, earning $950 a month, plus the benefits from a provided residence. The Board cannot find the opinion of Dr. Stein (that claimant is permanently totally disabled) or the second opinion of Dr. Murati (that claimant is permanently totally disabled) to be supported by the weight of the credible evidence in this litigation. The Board finds

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[2] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] K.S.A. 44-510c(a)(2).

that claimant is not permanently totally disabled, but is entitled to a permanent partial general work disability under K.S.A. 44-510e.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[5]

However, that statute must be read in light of both *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. However, it is acknowledged in this case, that claimant was incapable of performing the activities for respondent after his injury. Respondent made no offer of an accommodated job. Therefore, the Board finds claimant did not violate the policies set forth in *Foulk*.

In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

In this instance, the Board cannot find that claimant has failed to put forth a good faith effort to find employment. The Board, in fact, commends claimant in being able to locate a job that provides not only a monthly salary, but also room and board, especially considering claimant's limitations. Pursuant to K.S.A. 44-510e, the Board will use

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[5] K.S.A. 44-510e(a).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id*. at 320.

claimant's actual wages when computing claimant's post-injury wage for the purposes of a permanent partial general work disability.

The Board acknowledges the ALJ utilized $900 per month as earnings with Security Self Storage. However, the evidence supports a finding that claimant was actually being paid $950 per month, plus being provided board and lodging. K.S.A. 2001 Supp. 44-511(a)(2)(C) states that when board and lodging are furnished by the employer as part of the wages, it shall be valued at a maximum of $25 per week for the board and lodging combined, unless a higher weekly value is proven. As there is no evidence in this record as to the value of claimant's board and lodging, the Board will utilize $25 per week pursuant to the statute. In computing claimant's wage at $950 per month, this calculates to a weekly wage of $219.23, which, when added to the $25 board and lodging, results in a post-injury wage of $244.23 per week. This, when compared to claimant's pre-injury wage of $1,107.38 per week, results in a wage loss of 78 percent.

With regard to the second prong of K.S.A. 44-510e, the task loss percentage, the Board has considered the opinions of Dr. Mills, Dr. Murati and Dr. Stein. The Board rejects the opinion of Dr. Stein, who found claimant to be permanently and totally disabled. Additionally, Dr. Stein was provided no task list to review, so his opinion in that regard would be groundless.

In considering the 34 percent task loss opinion of Dr. Mills and the 31 percent task loss opinion of Dr. Murati, the Board finds no justifiable reason for giving one opinion greater weight over the other. The Board, therefore, in considering both opinions, finds claimant has suffered a 32.5 percent task loss. This results in a permanent partial general work disability of 55.25 percent for the injuries suffered on April 6, 2002.

K.S.A. 44-501(h) allows for a reduction in the weekly benefit amount when an employee is receiving retirement benefits under the federal social security act. The parties have not only stipulated to the fact of an offset, but have provided specific monthly amounts that claimant has been receiving since November 5, 2002, when the Social Security retirement payments began. For the year 2002, claimant's offset will be $243.69 per week. For the year 2003, claimant's weekly offset will be $249.92. For the year 2004, the weekly offset will be $250.98. And for the year 2005, the weekly offset will be $256.62.

Based upon claimant's average weekly wage, claimant clearly qualifies for the maximum weekly benefit of $417 per week.

Finally, it is noted that, in the Award, the ALJ awarded claimant future medical benefits upon proper application to and approval by the Director. Claimant was being provided pain medication through the services of Dr. Parks. However, it was noted that at the time of regular hearing, Dr. Parks had terminated his relationship with claimant, even though he continued providing claimant with pain medication. This indicates to the Board

that claimant does not have an authorized treating physician for his injuries for the purpose of ongoing treatment, including pain medication.

It is the duty of the employer to provide medical services which may be reasonably necessary to cure and relieve the employee from the effects of the injury.[9] It is acknowledged in this record that no cure is possible with claimant's injuries. However, respondent can relieve claimant from the effects of the injury by providing ongoing medical care, including pain management. Respondent is, therefore, ordered to appoint an authorized treating physician for the purposes of providing claimant conservative care, including pain medication, for his injuries. This authorization is limited to conservative care and does not include any surgeries which may arise in the future. For the purpose of anything beyond conservative care, appropriate application to and approval by the Director of the Division of Workers Compensation would be required.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 13, 2005, should be, and is hereby, affirmed in part and modified in part, and an award is granted in favor of the claimant, James H. Pierson, and against the respondent, Sears Roebuck & Company, and its insurance carrier, Liberty Mutual Fire Insurance Company, for an accidental injury which occurred on April 6, 2002, and based upon an average weekly wage of $1,107.38 for a 25.5 percent permanent partial general disability on a functional basis, followed thereafter by a 55.25 percent permanent partial general work disability. Respondent is awarded an offset pursuant to K.S.A. 44-501(h) for the Social Security retirement benefits above designated.

Claimant is awarded 7.71 weeks temporary total disability compensation at the rate of $417 per week totaling $3,215.07. Thereafter, claimant is awarded benefits for 22.7 weeks for a 25.5 percent permanent partial general disability on a functional basis, followed by 206.59 weeks for a 55.25 percent permanent partial general disability.

Pursuant to the stipulation of the parties, claimant is awarded 22.7 weeks permanent partial general disability at the unreduced rate of $417 for the period through November 4, 2002, totaling $9,465.90. Therefore, claimant is entitled to 22.7 weeks permanent partial general disability at the rate of $417 for the period through November 4, 2002, for a 25.5 percent permanent partial general disability, totaling $9,465.90. Thereafter, effective November 5, 2002, claimant is entitled to 206.59 weeks permanent partial general disability for a 55.25 percent permanent partial general work disability, which is to be paid as follows: For the period November 5,

[9] K.S.A. 44-510h(a).

2002, through December 31, 2002, claimant is entitled to receive 8.14 weeks of permanent partial disability compensation at the rate of $173.31 ($417 minus $243.69) per week totaling $1,410.74. For the period January 1, 2003, through December 31, 2003, claimant is entitled to receive 52.14 weeks of permanent partial disability compensation at the rate of $167.08 ($417 minus $249.92) per week totaling $8,711.55. For the period January 1, 2004, through December 31, 2004, claimant is entitled to receive 52.29 weeks of permanent partial disability compensation at the rate of $166.02 ($417 minus $250.98) per week totaling $8,681.19. Commencing January 1, 2005, claimant is entitled to receive 94.02 weeks of permanent partial disability compensation at the rate of $160.38 ($417 minus $256.62) per week totaling $15,078.38. The total award is $46,563.38.

As of December 31, 2005, there is due and owing claimant 7.71 weeks of temporary total disability compensation at the rate of $417 per week totaling $3,215.07, followed by 22.7 weeks of permanent partial disability compensation at the rate of $417 per week totaling $9,465.90, followed by 8.14 weeks of permanent partial disability compensation at the reduced rate of $173.31 per week totaling $1,410.74, followed by 52.14 weeks of permanent partial disability compensation at the reduced rate of $167.08 per week totaling $8,711.55, followed by 52.29 weeks of permanent partial disability compensation at the reduced rate of $166.02 per week totaling $8,681.19, followed by 52.14 weeks of permanent partial disability compensation at the reduced rate of $160.38 per week totaling $8,362.21, for a total due and owing of $39,846.66. Thereafter, the remaining balance of $6,716.72 shall be paid at $160.38 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director